

TITLE 14. Fish and Game Commission
Notice of Proposed Changes in Regulations

NOTICE IS HEREBY GIVEN that the Fish and Game Commission (Commission), pursuant to the authority vested by sections 1904 and 2070 of the Fish and Game Code and to implement, interpret or make specific sections 1755, 1904, 2062, 2067, 2070, 2072.7, and 2075.5 of said Code, proposes to amend Section 670.2, Title 14, California Code of Regulations, to add Orcutt's hazardia to the list of threatened species.

Informative Digest/Policy Statement Overview

At its August 1, 2002, meeting in San Luis Obispo, California, the Commission made a finding that Orcutt's hazardia warrants listing as threatened. The Department of Fish and Game therefore proposes to amend Section 670.2 of Title 14, CCR, to add Orcutt's hazardia to the list of endangered, threatened or rare plants. This proposal is based upon the documentation of population declines and threats to the habitat of this species to the point that it meets the criteria for listing as threatened by the Fish and Game Commission as set forth in the California Endangered Species Act (CESA). The Department is fulfilling its statutory obligation in making this proposal which, if adopted, would afford this species the recognition and protection available to it under CESA. Orcutt's hazardia is extremely rare in California, and is limited to one population occupying an area of less than 4 acres.

NOTICE IS ALSO GIVEN that any person interested may present statements, orally or in writing, relevant to this action at a hearing to be held in the Board of Supervisors Chambers, 981 "H" Street, Suite 100, Crescent City, California on Friday, October 25, 2002 at 8:30 a.m., or as soon thereafter as the matter may be heard. It is requested, but not required, that written comments be submitted on or before October 18, 2002 at the address given below, or by fax at (916) 653-5040, or by e-mail to FGC@dfg.ca.gov, but must be received no later than October 25, 2002, at the hearing in Crescent City, CA. E-mail comments must include the true name and mailing address of the commentor.

The regulations as proposed in strikeout-underline format, as well as an initial statement of reasons, including environmental considerations and all information upon which the proposal is based (rulemaking file), are on file and available for public review from the agency representative, John M. Duffy, Assistant Executive Director, Fish and Game Commission, 1416 Ninth Street, Box 944209, Sacramento, California 94244-2090, phone (916) 653-4899. Please direct inquiries to John M. Duffy or Sherrie Koell at the preceding address or phone number. Sandra Morey, Chief, Habitat Conservation Planning Branch, Department of Fish and Game, phone (916) 653-4875, 1416 Ninth Street, Sacramento, CA 95814, has been designated to respond to questions on the substance of the proposed regulations. Copies of the Initial Statement of Reasons, including the regulatory language, may be obtained from the address above. Notice of the proposed action shall be posted on the Fish and Game Commission website at http://www.dfg.ca.gov/fg_comm/.

Availability of Modified Text

If the regulations adopted by the Commission differ from but are sufficiently related to the action proposed, they will be available to the public for at least 15 days prior to the date of adoption. Any person interested may obtain a copy of said regulations prior to the date of adoption by contacting the agency representative named herein.

If the regulatory proposal is adopted, the final statement of reasons may be obtained from the address above when it has been received from agency program staff.

Impact of Regulatory Action

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the required statutory categories have been made:

(a) Significant Statewide Adverse Economic Impact Directly Affecting Business, including the Ability of California Businesses to Compete with Businesses in Other States:

The proposed action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states because the species is restricted to an area of less than four acres in southern coastal California.

While the statutes of the California Endangered Species Act (CESA) do not specifically prohibit the consideration of economic impact in determining if listing is warranted, the Attorney General's Office has consistently advised the Commission that it should not consider economic impact in making a finding on listing. This is founded in the concept that CESA was drafted in the image of the federal Endangered Species Act. The federal act specifically prohibits consideration of economic impact during the listing process.

CESA is basically a two-stage process. During the first stage, the Commission must make a finding on whether or not the petitioned action is warranted. By statute, once the Commission has made a finding that the petitioned action is warranted, it must initiate a rulemaking process to make a corresponding regulatory change. To accomplish this second stage, the Commission follows the statutes of the Administrative Procedure Act (APA).

The provisions of the APA, specifically sections 11346.3 and 11346.5 of the Government Code, require an analysis of the economic impact of the proposed regulatory action. While Section 11346.3 requires an analysis of economic impact on businesses and private persons, it also contains a subdivision (a) which provides that agencies shall satisfy economic assessment requirements only to the extent that the requirements do not conflict with other state laws. In

this regard, the provisions of CESA leading to a finding are in apparent conflict with Section 11346.3, which is activated by the rulemaking component of CESA.

Since the finding portion of CESA is silent to consideration of economic impact, it is possible that subdivision (a) of Section 11346.3 does not exclude the requirement for economic impact analysis. While the Commission does not believe this is the case, an abbreviated analysis of the likely economic impact of the proposed regulation change on businesses and private individuals is provided. The intent of this analysis is to provide disclosure, the basic premise of the APA process. The Commission believes that this analysis fully meets the intent and language of both statutory programs.

Designation of Orcutt's hazardia as threatened will subject it to the provisions of CESA. This act prohibits take and possession except as may be permitted by the Department, the Native Plant Protection Act, or in the California Desert Native Plants Act.

Threatened status is not expected to result in any significant adverse economic effect on small business or significant cost to private persons or entities undertaking activities subject to CEQA. CEQA requires local governments and private applicants undertaking projects subject to CEQA to consider *de facto* endangered (or threatened) species to be subject to the same requirements under CEQA as though they were already listed by the Commission in Section 670.2 (CEQA Guidelines, Section 15380). Based on its rarity, the Orcutt's hazardia would qualify for this protection under CEQA.

Required mitigation as a result of lead agency actions under CEQA, whether or not a taxon is listed by the Commission, may increase the cost of a project. Such costs may include, but are not limited to, purchase of off-site habitat, development and implementation of management plans, establishment of new populations, installation of protective devices such as fencing, protection of additional habitat, and long-term monitoring of mitigation sites. If the mitigation measures required by CEQA lead agency do not minimize and fully mitigate to the standards of CESA, listing could increase business costs by requiring measures beyond those required by CEQA.

- (b) Impact on the Creation or Elimination of Jobs within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California: None.
- (c) Cost Impacts on a Representative Private Person or Business:

Designation of threatened or endangered status, per se, would not necessarily result in any significant cost to private persons or businesses undertaking activities subject to CEQA. CEQA presently requires applicants undertaking projects subject to CEQA to consider *de facto* endangered (or threatened) and rare species to be subject to the same protections under CEQA as though they

are already listed by the Commission in Section 670.2 or 670.5 of Title 14, CCR (CEQA Guidelines Section 15380). Based on its rarity, Orcutt's hazardia would qualify for this protection under CEQA.

Because the only known population of Orcutt's hazardia occurs on land protected by a conservation easement, and is therefore not subject to development, it is unlikely that the listing of this species will have an adverse economic impact.

- (d) Costs or Savings to State Agencies or Costs/Savings in Federal funding to the State: None.
- (e) Nondiscretionary Costs/Savings to Local Agencies: None.
- (f) Programs Mandated on Local Agencies or School Districts: None.
- (g) Costs Imposed on any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4: None.
- (h) Effect on Housing Costs: None.

Effect on Small Business

It has been determined that the adoption of these regulations may affect small business.

Consideration of Alternatives

The Commission must determine that no reasonable alternative considered by the Commission, or that has otherwise been identified and brought to the attention of the Commission, would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

FISH AND GAME COMMISSION

August 13, 2002

Robert R. Treanor
Executive Director